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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

POARCH BAND OF CREEK INDIANS,
Cross-Petitioner,

v.

STATE OF ALABAMA and
JAMES E. FOLSOM, Governor, State of Alabama,
Cross-Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Congress, in the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(7), expressly provided for suits by Indian tribes against states to enforce the Act's requirement of good faith negotiations regarding Class III gaming. Does Congress have the power to authorize such suits, consistent with the Eleventh Amendment?

2. The doctrine of *Ex parte Young* authorizes suits in federal court against state officials for prospective relief to enjoin violations of federal law. Does the doctrine of *Ex parte Young* permit suit against a state governor to require good faith negotiations with an Indian tribe, as required by the Indian Gaming Regulatory Act?

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CROSS-PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion and judgment of the Eleventh Circuit is reported at 11 F.3d 1016 (11th Cir. 1994), and is reprinted in the Appendix to the State of Alabama's Petition for a Writ of Certiorari in No. 94-35 ("Al.App.") at A1-A69. Alabama's petition for rehearing in the Eleventh Circuit was denied on April 6, 1994. Al.App. at E1-E5.

The orders of the United States District Court for the Southern District of Alabama dismissing the action are reported at 776 F. Supp. 550 (S.D.Ala. 1991), Al.App. at B1-B70 and 784 F. Supp. 1549 (S.D. Ala. 1992), Al.App. at D1-D23.

STATEMENT OF JURISDICTION

The judgment of the Eleventh Circuit was entered on January 18, 1994. Al.App. at A1. Alabama's petition for rehearing was denied on April 6, 1994. Al.App. at E1-E5. Alabama's petition for a writ of certiorari was filed and received on July 1, 1994. This cross-petition is filed, in accordance with Rule 12.3 of this Court, within 30 days after receipt of Alabama's petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTIONAL PROVISIONS

The Commerce Clause, U.S. Const. art. I, § 8, cl. 3:

> The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

The Eleventh Amendment to the U.S. Constitution:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

STATUTES

25 U.S.C. § 2710(d)(7):

> (A) The United States district courts shall have jurisdiction over—
>
> > (i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith . . . .
>
> (B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the

close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

25 U.S.C. § 2710(d) is reprinted in Al.App. at G1-G18.

STATEMENT UNDER RULE 29.4(b)

In accordance with Rule 29.4(b) of this Court, this cross-petition is being served on the Solicitor General of the United States because 28 U.S.C. § 2403(a) may be applicable, as the constitutionality of certain provisions of the Indian Gaming Regulatory Act [1] may be drawn in question.

STATEMENT OF THE CASE

This is an action by the Poarch Band of Creek Indians ("Tribe"),[2] a federally recognized Indian tribe, against the State of Alabama and its Governor, to secure compliance with the requirement of the Indian Gaming Regulatory Act ("IGRA") that they negotiate with the Tribe "in good faith" regarding a tribal-state compact to govern Class III gaming. 25 U.S.C. § 2710(d)(7)(A)(i).

Enacted in 1988, IGRA establishes a comprehensive federal regulatory framework for Indian gaming. The Act divides gaming into three categories.[3] Class III gam-

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[1] Pub. L. No. 100-497, 102 Stat. 2467, codified at 25 U.S.C. §§ 2701 *et seq.*

[2] "Poarch Band of Creek Indians" is the Tribe's official name, and the sole name under which the complaint and all pleadings were filed for the Tribe. For reasons unknown to the Tribe, the Eleventh Circuit used the additional name "Poarch Creek Indians" in its case caption, which has been carried over into the caption of the petition in No. 94-35. In this cross-petition, we use the Tribe's proper name, "Poarch Band of Creek Indians."

[3] Class I gaming includes traditional forms of Indian gaming such as "social games solely for prizes of minimal value . . . ." 25 U.S.C. § 2703(6). Class II gaming includes bingo, and related games such as pull-tabs, punch boards, lotto, tip jars, instant bingo

ing—the most significant class economically—is permissible if, *inter alia*, it is "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State . . . ." 25 U.S.C. § 2710(d)(1)(C).

While the compact requirement provides a role for states with regard to Indian gaming, Congress in enacting IGRA remained concerned that states not abuse the compacting process and either unreasonably refuse to enter compact negotiations or unreasonably refuse to agree to compact terms. S.Rep. No. 446, 100th Cong., 2d Sess. 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083 ("[i]t is the Committee's intent that the compact requirement for class III not be used as a justification by a State for excluding Indian tribes from such gaming . . . ."). Accordingly, Congress provided that if a state fails to negotiate in good faith, the federal district courts shall have jurisdiction over

> any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact . . . or to conduct such negotiations in good faith.

25 U.S.C. § 2710(d)(7)(A)(i).

In July 1990, the Poarch Band of Creek Indians requested the Governor of Alabama to commence negotiations regarding a compact for Class III gaming. Those negotiations failed to achieve a compact. In September 1991, the Tribe filed this action, as provided in IGRA.[4]

The District Court granted the State's motion to dismiss on Eleventh Amendment grounds. *Poarch Band of*

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and "other games similar to bingo . . . ." 25 U.S.C. § 2703(7)(A). Class III gaming is all gaming not Class I or Class II. 25 U.S.C. § 2703(8).

[4] The gravamen of the complaint was that, by not negotiating with regard to certain forms of gaming that the Tribe claimed were permitted by the State, the defendants failed to comply with IGRA's obligation that they negotiate in good faith.

Creek Indians v. Alabama, 776 F. Supp. 550, 551, 553-563 (S.D.Ala. 1991), Al.App. at B1-B2, B9-B66. In a separate order, the District Court dismissed the Governor, rejecting the Tribe's argument that the action could proceed against the Governor under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). *Poarch Band of Creek Indians v. Alabama*, 784 F. Supp. 1549, 1550-52 (S.D.Ala. 1992), Al.App. at D1-D2, D4-D17.

The Tribe appealed both orders. The Eleventh Circuit consolidated the appeal with *Seminole Tribe of Florida v. Florida*, No. 92-4652, and the two cases were argued and decided together. The Eleventh Circuit held that Congress, in enacting IGRA, intended states to be subject to actions by tribes regarding good faith negotiations. *Seminole Tribe*, 11 F.3d at 1024, Al.App. at A33-A40. Nevertheless, the Eleventh Circuit concluded that Congress lacks the power to abrogate the states' Eleventh Amendment immunity when it acts under the Indian Commerce Clause, the power under which it enacted IGRA. *Id.* at 1019, 1026-28, Al.App. at A3-A4, A47-A61. The Eleventh Circuit also rejected application of the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), finding that negotiations under IGRA are discretionary, and that the actions by the tribes under IGRA are really against the states. *Id.* at 1028-29, Al.App. at A61-A66.

The Eleventh Circuit also noted that, as a result of its ruling, the portions of IGRA addressing the jurisdiction of the federal courts in connection with good faith actions against states are rendered inapplicable, absent state consent. *Id.* at 1029, Al.App. at A66. Rather than declaring IGRA's complete statutory framework regarding Class III gaming invalid, the Eleventh Circuit suggested that in the circumstances of this case—where Class III gaming negotiations are unsuccessful and a state successfully interposes an Eleventh Amendment defense to a good faith action by a tribe—IGRA authorizes the tribe to seek, and the Secretary of Interior to prescribe, regula-

tions for Class III gaming. *Id.* at 1029, Al.App. at A67-A69.

Alabama filed a petition for rehearing with regard to the Eleventh Circuit's language on Secretarial authority. Alabama's petition for rehearing was denied, with no judge voting to grant the petition. Al.App. at E1-E5.

The judgment of the Eleventh Circuit thus affirmed dismissal of this action on Eleventh Amendment grounds, as sought by the State. Although the judgment was in its favor, Alabama filed a petition for writ of certiorari on July 1, 1994. *State of Alabama v. Poarch Creek Indians*, No. 94-35. Alabama's petition seeks review of the language in the Eleventh Circuit's opinion regarding Secretarial authority to prescribe Class III gaming procedures —language the Secretary has not implemented.

This cross-petition seeks review of the judgment of the Eleventh Circuit—which held that this action by the Tribe, seeking to enjoin continued non-compliance with IGRA's requirement of good faith negotiations, is barred by the Eleventh Amendment.[5]

Before discussing reasons for granting this cross-petition, we call to the Court's attention that Congress is considering legislation that may obviate the need for this Court to address these issues. Congress has pending before it a comprehensive revision of IGRA that, among other things, would fundamentally alter the framework under which tribes could undertake Class III gaming.

The Indian Gaming Regulatory Act Amendments Act of 1994, S. 2230, was introduced in the Senate on June 23, 1994. S. 2230, 103rd Cong., 2d Sess. (1994); *see* 140 Cong. Rec. S7561 (daily ed. June 23, 1994) (remarks

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[5] The petition in No. 94-12, *Seminole Tribe of Florida v. Florida*, seeks review of the same judgment and opinion of the Eleventh Circuit and raises essentially identical issues to those in this cross-petition. Accordingly, if the Court grants the petition in No. 94-12, it should likewise grant the cross-petition here.

of Senator Inouye). This measure, sponsored by Senator Inouye (D-Hawaii), Chairman of the Senate Indian Affairs Committee, and Senator McCain (R-Ariz.), Vice-Chairman of that Committee, follows from a year-long series of negotiations between the states, represented by the Governors and Attorneys General, and the tribes regarding how to address through legislation significant issues that have arisen under IGRA.[6] Among other things, S. 2230 would establish a new process for tribes to enter compacts permitting Class III gaming. This new process is intended to remedy the issues related to Eleventh Amendment immunity that have arisen in cases like this one.

Currently, under IGRA a compact with a state is a major precondition for a tribe to conduct Class III gaming. 25 U.S.C. § 2710(d)(1)(C). If compact negotiations between a tribe and state fail, the remedy is for the tribe to sue the state in federal court, alleging a failure of the state "to conduct such negotiations in good faith . . . ." 25 U.S.C. § 2710(d)(7)(A)(i). This remedy has been thwarted, in actions like this one, by states invoking as a defense their immunity under the Eleventh Amendment.

S. 2230, however, dispenses with the "good faith" lawsuit as part of the IGRA scheme. As an initial matter, under S. 2230, a tribe seeking to undertake Class III gaming would notify the Secretary of the Interior. S. 2230, section 10(a)(3)(A)(i). Notice would also be provided to the state. S. 2230, section 10(a)(3)(B)(i). The terms of a Class III gaming compact would be negotiated between the tribe and the Secretary, unless the state affirmatively requested to be the negotiating party.

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[6] 140 Cong. Rec. S7561 (daily ed. June 23, 1994) (remarks of Senator Inouye) ("a substantial portion of the measure we introduce reflects the work of State and tribal representatives that has been produced over countless hours and days of negotiations that began in earnest the week of July 12, 1993").

S. 2230, section 10(a)(3)(A)(i)-(iv) and (B)(iii)-(iv). Such a request by a state "shall be deemed to constitute a voluntary waiver of the sovereign immunity of the State for the purposes of this Act." S. 2230, section 10(a)(3)(B)(iv).

In other words, under S. 2230, state participation in the process leading to tribal Class III gaming would be at the state's option, and such participation would be deemed to be a voluntary waiver of immunity, pursuant to the terms of the bill. A state not wishing to have its immunity waived would be free to take no part—to leave the matter of gaming regulation to the federal government and the tribe, as is typically the case in the conduct of Indian affairs. In short, if S. 2230 is enacted, judicial resolution of the questions presented here may not be necessary.[7] Senator Inouye has expressed his intent to move forward quickly with the legislation, *see* 140 Cong. Rec. S7562 (daily ed. June 23, 1994) (remarks of Senator Inouye), and the Senate Indian Affairs Committee held hearings on the measure on July 19 and July 25, 1994.

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[7] Enactment of S. 2230 would also moot the issues raised in Alabama's petition in No. 94-35. The State seeks review of the language in the Court of Appeals' opinion that indicates that the Secretary has the authority, in the circumstances of this case, to issue Class III gaming regulations for the Tribe. Pet. at 9-29. Enactment of S. 2230 would vitiate the need for resolving that issue as well. Under the framework established by S. 2230, the Secretary would negotiate compacts with tribes as an initial matter. S. 2230, section 10(a)(3)(A). His authority to do so in the circumstances raised here—where a state successfully invokes the Eleventh Amendment in a tribal action concerning "good faith"—would no longer be an issue.

REASONS FOR GRANTING THE WRIT

This cross-petition presents questions regarding the Eleventh Amendment that have not been addressed by this Court, as to which there is a conflict in the Circuits. Unless the Court determines that, for prudential reasons, it will defer action to permit Congress time to complete its reconsideration of this matter (as described in the Statement of the Case above), the cross-petition should be granted for the following reasons.

I. THE DECISION OF THE ELEVENTH CIRCUIT CONFLICTS WITH DECISIONS FROM OTHER CIRCUITS

The Eleventh Circuit held that while Congress clearly intended in IGRA to abrogate the states' Eleventh Amendment immunity from suit, it lacked the power to do so. *Seminole Tribe*, 11 F.3d at 1019, 1024-28, Al.App. at A3-A4, A36-A61. As recently summarized by the Ninth Circuit, the Courts of Appeals are in conflict on this issue:

> The dispositive issue in this appeal and cross-appeal is whether the state is immune from this suit under the Eleventh Amendment despite the fact that Congress, acting pursuant to its plenary constitutional power to regulate Indian affairs, clearly intended to authorize such suits. There is an existing circuit conflict on this issue. The Eighth Circuit has held that states are not immune, Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273 (8th Cir. 1993), while the Eleventh Circuit has held that they are. Seminole Tribe of Florida v. Florida, 11 F.3d 1016 (11th Cir. 1994) . . . . We reverse, holding that the state is not immune from suit . . . .

Spokane Tribe of Indians v. Washington, No. 92-35113, No. 92-35446, 1994 U.S. App. LEXIS 16566, at *1-2 (9th Cir. July 6, 1994). Thus, the Eleventh Circuit's decision is directly at odds with decisions of the Eighth

and Ninth Circuits. Additional cases raising the same issue are pending before the Tenth Circuit.[8] Certiorari should be granted to resolve the conflict.

II. THE DECISION OF THE ELEVENTH CIRCUIT RAISES IMPORTANT ISSUES OF FEDERAL LAW THAT HAVE NOT BEEN ADDRESSED BY THIS COURT

This Court has upheld Congressional authority to abrogate state Eleventh Amendment immunity under section 5 of the Fourteenth Amendment, and under the Commerce Clause. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 19 (1989). But, the Court "has never addressed the intersection of federal power over tribes and state sovereign immunity that the IGRA represents." *Spokane Tribe*, 1994 U.S. App. LEXIS 16566, at *11.

The Courts of Appeals have found *Union Gas* to be the "case most relevant" to the issue of Congress' power to abrogate state Eleventh Amendment immunity under IGRA. *Seminole Tribe*, 11 F.3d at 1026, Al.App. at A47; *see also Spokane Tribe*, 1994 U.S. App. LEXIS 16566, at *13. In *Union Gas*, the plurality reaffirmed the principle set forth in *Fitzpatrick*:

> When Congress acts pursuant to § 5 [of the Fourteenth Amendment], not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority.

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[8] *Kickapoo Tribe of Indians v. Kansas*, No. 93-3110 (10th Cir. argued Nov. 8, 1993); *Ponca Tribe of Oklahoma v. Oklahoma*, No. 92-6331 (10th Cir. argued Nov. 8, 1993); *Pueblo of Sandia v. New Mexico*, No. 93-2018 (10th Cir. argued Nov. 8, 1993); *Apache Tribe of the Mescalero Reservation v. New Mexico*, No. 93-2020 (10th Cir. argued Nov. 8, 1993).

Union Gas, 491 U.S. at 16 (quoting *Fitzpatrick v. Bitzer*, 427 U.S. at 456). The plurality in *Union Gas* expressly applied this rationale, concluding that since the Commerce Clause "withholds power from the States at the same time as it confers it on Congress," Congress has authority to abrogate state Eleventh Amendment immunity when acting under the Commerce Clause. *Id.* at 19.

The Eleventh Circuit, however, rejected application of the *Union Gas* rationale, on the ground that *Union Gas* arose under the Interstate Commerce Clause, while IGRA, in the Court's view, was enacted under the Indian Commerce Clause. *Seminole Tribe*, 11 F.3d at 1027, Al.App. at A53-A58. Noting merely that "the different purposes underlying the two clauses mandate that they be treated distinctly," the Eleventh Circuit declined to analyze the impact such differences may have on Congressional power to abrogate Eleventh Amendment immunity. *Id.*, Al.App. at A58.[9]

In contrast, the Ninth Circuit in *Spokane* specifically applied the rationale of the *Union Gas* plurality and the *Fitzpatrick* majority, holding

> In this case, as in Union Gas and Fitzpatrick, Congress is acting under one of its plenary powers. As the Supreme Court explained in Cotton Petroleum, the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs. In 1832, the Supreme Court pronounced that the Indian Commerce Clause, together with Congress' constitutional power to conclude treaties with Indian tribes, provide Congress with "all that is required" for complete

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[9] The Eleventh Circuit also stated that, even if it was inclined to apply the rationale from *Union Gas*, it would hold that Congress lacked power to abrogate state Eleventh Amendment immunity by enacting IGRA because the activity involved is not "a typically private activity." *Id.* at 1028, Al.App. at A59-A61. No case of this Court—and no lower court considering the issue presented here—supports such a formulation.

> control over Indan affairs. Worcester v. Georgia, 31 U.S. 515, 558, 8 L.Ed. 483 (1832).
>
> * * * *
>
> Congressional power pursuant to the Indian Commerce Clause, then, cannot be less than its authority under the Interstate Commerce Clause.

Spokane Tribe of Indians, 1994 U.S. App. LEXIS 16566, at *16-18. The Ninth Circuit accordingly upheld Congressional authority to abrogate state Eleventh Amendment immunity through IGRA. *Id.* at *20-21.

Review by this Court is needed to resolve whether Congressional power to abrogate states' Eleventh Amendment immunity through IGRA is supported by the plenary nature of the Indian Commerce Clause—a position endorsed, correctly in our view, by the Ninth Circuit, and rejected by the Eleventh Circuit.

III. THE DECISION OF THE ELEVENTH CIRCUIT CONFLICTS WITH EX PARTE YOUNG, 209 U.S. 123 (1908)

Both *Union Gas* and *Fitzpatrick* involved the core issue of state Eleventh Amendment immunity—claims for money damages against states. In contrast, in this case, the Tribe seeks only prospective injunctive relief, to require the Governor to comply with the statutory requirement to negotiate in good faith. 25 U.S.C. § 2710(d)(7)(A)(i) and (iii). Accordingly, the Tribe's suit against the Governor here is permissible under *Ex parte Young*, 209 U.S. 123 (1908).

The doctrine of *Ex parte Young* authorizes actions against state officials to prohibit continued violation of federal law. As this Court has noted:

> Ex Parte Young was a watershed case in which this Court held that the Eleventh Amendment did not bar an action in the federal courts seeking to enjoin the Attorney General of Minnesota from enforcing a

> statute claimed to violate the Fourteenth Amendment . . . . But the relief awarded in Ex Parte Young was prospective only; the Attorney General of Minnesota was enjoined to conform his future conduct of that office to the requirement of the Fourteenth Amendment.

Edelman v. Jordan, 415 U.S. 651, 664 (1974). The distinction between prospective injunctive relief against state officials, which is permissible, and retroactive relief including money damages, which is barred by the Eleventh Amendment, is at the heart of the doctrine. *Id.* at 664-71.

Here, the Tribe seeks an order requiring the Governor to stop violating IGRA's directive regarding good faith negotiations. Nothing in this action seeks retroactive relief. Nor, contrary to the Eleventh Circuit's ruling, does the Tribe seek to compel the exercise of discretion by the Governor. *Seminole Tribe*, 11 F.3d at 1028-29, Al.App. at A61-A64. The statutory duty to negotiate in good faith is not discretionary. 25 U.S.C. § 2710(d)(3)(A). And, the Governor, as the official who in fact conducted compact negotiations with the Tribe, is an appropriate defendant.

The Court should grant certiorari to clarify that IGRA does not render unavailable the relief this Court has upheld under the doctrine of *Ex parte Young*—prospective injunctive relief to compel a state official to comply with federal law.

CONCLUSION

For the foregoing reasons, the cross-petition for a writ of certiorari should be granted.

Respectfully submitted,

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v.

STATE OF ALABAMA and JAMES E. FOLSOM,
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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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August, 1994

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ARGUMENT

Alabama and its Governor (Cross-Respondents and hereafter "Alabama") agree that the instant decision is in direct conflict with the opinion of the Eighth Circuit Court of Appeals in Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273 (8th Cir. 1993) and the Ninth Circuit Court of Appeals in Spokane Tribe of Indians v. Washington State, ____ F.3d ____ 1994 WL 316443 (9th Cir. 1994). The conflict among the circuits and the several district court cases cited by the Tribe (Cross-Petitioner), which also show a pronounced split, indicate that this is a question of importance which should be decided by this Court by upholding the decision of the Eleventh Circuit on the Eleventh Amendment question.

Were this Court to address the question of Congress' power to abrogate the states' Eleventh Amendment immunity

pursuant to the Indian Commerce Clause, Art. I, § 8, cl. 3, Alabama does not accede to the arguments of the Tribe.[1] Alabama asserts that the court below properly found that Congress lacked the referenced power. In addition, Alabama takes issue with the Tribe's second and third reasons for granting the writ. The court below properly limited the holding in Pennsylvania v. Union Gas, 491 U.S. 1 (1989), to the Interstate Commerce Clause and it properly rejected the application of the exceptions set forth in Ex parte Young, 209 U.S. 123 (1908).

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[1]The Seminole Tribe of Florida also raised these issues in an original Petition for Certiorari. Seminole Tribe of Florida v. State of Florida, Docket No. 94-12.

The Tribe makes reference to the remedy set forth in Part V. of the opinion of the court below. (Cross-Petition at 6) That portion of the opinion is the subject of a Petition filed by Alabama on July 1, 1994.[2] The Ninth Circuit in Spokane addresses this remedy and creates a conflict in the circuits by denouncing it. The Ninth Circuit stated that "[the] Eleventh Circuit's solution would turn the Secretary of the Interior into a federal czar, contrary to the congressional aim of state participation." Spokane, 1994 WL 316443 at *5. Therefore, this Court needs to consider the issues raised in both

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[2]These issues are also raised in a Cross-Petition for Certiorari filed by the State of Florida. State of Florida v. Seminole Tribe of Florida, Docket Number _____.

Alabama's Petition and the Tribe's Cross-Petition as there exists a conflict in the circuits on the issue raised in each.

Rather than respond to the Tribe's arguments on the merits of this case at this juncture, Alabama intends to reserve the right to raise all substantive arguments in opposition to the Tribe's claims, if necessary, in Alabama's answer brief on the merits.

CONCLUSION

The Eleventh Amendment arguments presented by the Tribe in the Cross-Petition are faulty and were clearly rejected by the Eleventh Circuit. This Court should resolve the Eleventh Amendment conflict in the circuits by upholding the Eleventh Circuit's decision.

This Court should also resolve the conflict in the circuits on the issue of

the judicially-created remedy by vacating or by reversing Part V. of the Eleventh Circuit decision.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1994

SEMINOLE TRIBE OF FLORIDA, PETITIONER

v.

STATE OF FLORIDA, ET AL.

STATE OF ALABAMA, ET AL., PETITIONERS

v.

POARCH CREEK INDIANS

POARCH BAND OF CREEK INDIANS, CROSS-PETITIONER

v.

STATE OF ALABAMA, ET AL.

STATE OF FLORIDA AND LAWTON CHILES, GOVERNOR OF FLORIDA, ET AL., CROSS-PETITIONERS

v.

SEMINOLE TRIBE OF FLORIDA

ON PETITIONS AND CROSS-PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2710(d)(7), provides federal courts with jurisdiction over claims by Indian Tribes that States have failed to negotiate gaming compacts in good faith. The questions presented are:

1. Whether Congress has authority under the Indian Commerce Clause, Article I, Section 8, Clause 3 of the Constitution, to abrogate a State's immunity from suit.

2. Whether the doctrine of *Ex parte Young* permits a suit against a state governor arising from a State's failure to negotiate an Indian gaming compact in good faith.

3. Whether, if a suit to require a State and its governor to negotiate a gaming compact is precluded by sovereign immunity, the Secretary of the Interior has statutory authority under IGRA to prescribe regulations governing Indian gaming.

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. In 1987, this Court held that neither Public Law 280 (18 U.S.C. 1162) nor any other provision of federal law authorized California to enforce its gaming laws with respect to bingo and card games conducted by Indian Tribes, because state law regulated rather than prohibited such gaming. *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). That decision left much Indian gaming unregulated by the States. 94-12 Pet. App. 3a. At the same time, federal law did not provide "clear standards or regulations for the conduct of gaming on Indian lands." 25 U.S.C. 2701(3). In an attempt to fill that void, Congress in 1988 enacted the Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467, 25 U.S.C. 2701 *et seq.*

IGRA's purpose was "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. 2702(1). Congress simultaneously sought to "shield [Indian gaming] from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players." 25 U.S.C. 2702(2). To fulfill those purposes, IGRA divides gaming into three classes, each of which is regulated differently.

Class I gaming, over which Indian Tribes exercise exclusive regulatory control, consists of social games for prizes of minimal value and traditional games engaged in as part of tribal ceremonies. 25 U.S.C. 2703(6), 2710(a)(1). Class II gaming consists of bingo, other games similar to bingo (when played in the same location), and non-banking card games. 25 U.S.C. 2703(7). Indian Tribes maintain regulatory jurisdiction over

class II gaming, see 25 U.S.C. 2710(a)(2), subject to the supervision of the National Indian Gaming Commission (an entity within the Department of the Interior). 25 U.S.C. 2704. An Indian Tribe may engage in class II gaming if: (1) the State in which the gaming is located "permits such gaming for any purpose by any person," (2) such gaming is not prohibited on Indian lands by federal law, and (3) the gaming is conducted pursuant to a tribal ordinance that satisfies specified statutory requirements and is approved by the Chairman of the Commission. 25 U.S.C. 2710(b).

Class III gaming, at issue here, is gaming that does not fall within class I or class II, and includes banking card games, casino games, slot machines, horse racing, dog racing, jai alai, and lotteries. 25 U.S.C. 2703(8); 25 C.F.R. 502.4. Class III gaming is lawful only if it is: (1) authorized by a tribal ordinance that satisfies the requirements in 25 U.S.C. 2710(b) for class II gaming and is approved by the Chairman of the Commission; (2) located in a State that permits such gaming; and (3) conducted in conformance with a compact between the Indian Tribe and the State. 25 U.S.C. 2710(d)(1). To facilitate the formation of a tribal-state compact, IGRA provides that, upon request by the Tribe, "the State shall negotiate with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. 2710(d)(3)(A).

Congress provided for judicial consideration of a Tribe's allegation that a State has failed to negotiate a tribal-state compact in good faith. Under 25 U.S.C. 2710(d)(7)(A)(i), "[t]he United States district courts shall have jurisdiction over * * * any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact * * * or to conduct such negotiations in good faith." A

Tribe may initiate such a cause of action 180 days after requesting the State to enter into negotiations. 25 U.S.C. 2710(d)(7)(B)(i). In such a suit, the Tribe must initially introduce evidence that a tribal-state compact has not been concluded and that the State did not respond to the request to negotiate or did not respond in good faith. 25 U.S.C. 2710(d)(7)(B)(ii). Once such evidence is introduced, "the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith." 25 U.S.C. 2710(d)(7)(B)(ii).

If the district court finds that the State has failed to negotiate in good faith, "the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period." 25 U.S.C. 2710(d)(7)(B)(iii). If the parties fail to conclude a tribal-state compact within that 60-day period, the Tribe and the State each must submit a proposed compact to a mediator appointed by the district court. 25 U.S.C. 2710(d)(7)(B)(iv). The mediator then is to select the compact "which best comports with the terms of [IGRA] and any other applicable Federal law and with the findings and order of the court." *Ibid.* Once the mediator submits the selected compact to the State and the Tribe, the State has 60 days in which to consent. 25 U.S.C. 2710(d)(7)(B)(v) and (vi).

If the State consents within the 60-day period to the compact selected by the mediator, the compact shall be treated as a tribal-state compact entered into by agreement pursuant to 25 U.S.C. 2710(d)(3). See 25 U.S.C. 2710(d)(7)(B)(vi). If the State does not consent, "the mediator shall notify the Secretary [of the Interior] and the Secretary shall prescribe, in consultation with the Indian tribe, procedures [for class III gaming] * * * which are consistent with the proposed compact selected by the mediator * * *, the provisions of [IGRA], and the

relevant provisions of the laws of the State." 25 U.S.C. 2710(d)(7)(B)(vii).

2. In January 1991, the Seminole Tribe of Florida requested the State of Florida to commence negotiations for a compact governing gaming operations proposed by the Tribe. 94-12 Pet. App. 44a. The State was willing to negotiate concerning card games, raffles, and pari-mutuel wagering on dog racing, horse racing, and jai alai. The State refused, however, to negotiate over any form of casino gambling. For that reason, negotiations broke down. *Id.* at 45a.

In December 1991, the Tribe filed suit in the United States District Court for the Southern District of Florida against the State and its Governor. 94-12 Pet. App. 26a. The Tribe alleged that the State had failed to conduct good faith negotiations as required by 25 U.S.C. 2710(d)(3)(A). The Florida defendants filed a motion to dismiss on the ground that the Eleventh Amendment barred federal court jurisdiction over the suit. 94-12 Pet. App. 26a, 28a. The district court denied the motion to dismiss. It held that "Congress did in fact abrogate the States' immunity when it enacted IGRA, and * * * that, pursuant to the Indian Commerce Clause, Congress plainly had the constitutional power to abrogate." 94-12 Pet. App. 30a.

3. In July 1990, the Poarch Band of Creek Indians requested the Governor of Alabama to negotiate a compact to govern class III gaming. 94-189 Cross-Pet. 4. The State offered to negotiate concerning pari-mutuel wagering on horse, dog and simulcast races, but refused to negotiate concerning casino gambling. 94-35 Pet. 6-7. An impasse in the negotiations resulted. *Ibid.*

In September 1991, the Poarch Band filed suit against the State of Alabama and its Governor in the United States District Court for the Southern District of

Alabama. 94-35 Pet. App. B6. The Alabama defendants filed a motion to dismiss based on sovereign immunity. *Id.* at B8. The district court granted that motion. The court acknowledged that "IGRA clearly expresses Congress' intention to allow states to be sued by Indian tribes in federal court." *Id.* at B31. It held, however, that "Congress does not have the power to abrogate a state's Eleventh Amendment immunity when enacting legislation pursuant to its power found in the Indian Commerce Clause." *Id.* at B36-B37. In a separate order, the district court also dismissed the Tribe's claim against the Governor on sovereign immunity grounds. *Id.* at C1-C9.

4. The court of appeals consolidated the Florida and Alabama cases for purposes of appeal. The court agreed with both district courts that "Congress intended to abrogate the states' sovereign immunity." 94-12 Pet. App. 15a. It reasoned that "unless Congress intended to abrogate the states' immunity," the grant of jurisdiction in 25 U.S.C. 2710(d)(7)(A)(i) over claims that a State has not negotiated in good faith "would be of no effect." 94-12 Pet. App. 14a-15a.

The court went on to hold, however, that Congress lacks power under the Indian Commerce Clause of the Constitution (Art. I, § 8, Cl. 3) to abrogate a State's immunity from suit. The court of appeals acknowledged that *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989), held that Congress has the power under the Interstate Commerce Clause to abrogate a State's immunity from suit. 94-12 Pet. App. 18a-20a. The court concluded, however, that *Union Gas* was distinguishable for two reasons. *Id.* at 20a-22a.

First, the court noted that although Congress's "plenary powers under the Interstate Commerce Clause * * * allow Congress to place limits on the states in

order to 'maintain[] free trade among the States, * * * the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.'" 94-12 Pet. App. 21a (quoting *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 192 (1989)). For that reason, the court concluded, "the unique abrogation power afforded Congress under the Interstate Commerce Clause in *Union Gas* cannot be extended to the Indian Commerce Clause." 94-12 Pet. App. 21a. Second, the court observed that "the Court has allowed federal jurisdiction over states only when the states partake in an activity typical of private individuals." *Id.* at 22a. Viewing the negotiations contemplated by IGRA as within "the typical realm of state authority," the court concluded that "the principles of federalism and sovereign immunity exemplified in the Eleventh Amendment prevent congress from abrogating the states' immunity." *Ibid.*

The court of appeals next held that the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), does not permit a suit against a State's governor to require good faith negotiations under IGRA. The court found the *Ex parte Young* doctrine inapplicable because it viewed negotiation of a compact under IGRA as discretionary and because it viewed a suit against the governor under IGRA as "in reality * * * against the State itself." 94-12 Pet. App. 23a-24a. The court reasoned that IGRA "uniformly addresses itself to 'the State'; not once does it impose duties or responsibilities on a particular officer of the state." *Ibid.*

Finally, the court discussed the question of "what procedure is left for an Indian tribe faced with a state that not only will not negotiate in good faith, but also will not consent to suit." 94-12 Pet. App. 25a. Relying on the severability clause in IGRA (25 U.S.C. 2721), the

court expressed the view that if a State pleads an Eleventh Amendment defense and the case is dismissed, the Tribe "may notify the Secretary of the Interior of the tribe's failure to negotiate a compact with the state." *Ibid.* At that point, the court continued, "[t]he Secretary then may prescribe regulations governing class III gaming on the tribe's lands." *Ibid.*

Having held that sovereign immunity precluded suit under IGRA against a State or its governor without the State's consent, the court reversed the district court's decision in the Florida case and remanded with directions to dismiss the suit. 94-12 Pet. App. 25a. The court affirmed the order of dismissal in the Alabama case. *Ibid.*[1]

DISCUSSION

The tribal petitioners in Nos. 92-12 and 94-189 seek review of the court of appeals' holding that Congress lacks power under the Indian Commerce Clause to subject States to suit under the Indian Gaming Regulatory Act, 25 U.S.C. 2710(d)(7). Review of that ruling is warranted because the court of appeals has, in essence, held an Act of Congress unconstitutional, and because its decision conflicts with the decisions of three other courts of appeals that have sustained the power of Congress to provide for the type of suit at issue here.

The tribal petitioners also seek review of the court of appeals' holding that an Indian Tribe may not bring a

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[1] While the appeal from the order denying the motion to dismiss the Florida case was pending in the court of appeals, the district court granted summary judgment on the merits in favor of Florida, finding that it had negotiated in good faith. The Seminole Tribe has appealed from that judgment, but its appeal has been stayed pending the outcome of the Tribe's petition here. 94-12 Pet. App. 84a.

suit under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), against the governor of a State arising from the State's failure to negotiate in good faith. Because a decision in the Tribe's favor on that issue might obviate the need for a resolution of the broader constitutional question, the Court should grant the Tribe's petition on the *Ex parte Young* question as well.

The state petitioners in Nos. 94-35 and 94-219 seek review of the court of appeals' expression of the view that, if a State does not consent to suit by a Tribe, the Secretary of the Interior would have authority to prescribe regulations to govern the conduct of gaming on the Tribe's Indian lands. That discussion in the opinion below is dicta, since the court ordered the case dismissed on sovereign immunity grounds, and the question does not in any event warrant plenary review at this time. We therefore suggest that the Court hold the States' petitions raising that issue pending its decision in Nos. 94-12 and 94-189.

1. a. Section 2710(d)(7)(A)(i) of IGRA provides that "[t]he United States district courts shall have jurisdiction over * * * any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact [regulating class III gaming] * * * or to conduct such negotiations in good faith." 25 U.S.C. 2710(d)(7)(A)(i). Although the court of appeals correctly interpreted this jurisdictional provision as manifesting Congress's intent to abrogate a State's immunity from suit,[2] it

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[2] Compare *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775, 786-788 (1991) (holding that 28 U.S.C. 1362 does not manifest a sufficiently clear congressional intent to abrogate state sovereign immunity in suit by Tribe).

concluded that Congress lacked authority under the Indian Commerce Clause to accomplish such an abrogation. Thus, the court essentially held 25 U.S.C. 2710(d)(7)(A)(i) unconstitutional.

That holding conflicts with the holdings of the Eighth, Ninth, and Tenth Circuits. All three of those courts have upheld the constitutionality of 25 U.S.C. 2710(d)(7)(A)(i), reasoning that Congress has the power under the Indian Commerce Clause to abrogate a State's immunity from suit. *Cheyenne River Sioux Tribe* v. *South Dakota*, 3 F.3d 273, 280-281 (8th Cir. 1993); *Spokane Tribe of Indians* v. *Washington*, 28 F.3d 991, 995-997 (9th Cir. 1994), petition for cert. pending, No. 94-357 (filed Aug. 29, 1994); *Ponca Tribe of Oklahoma* v. *Oklahoma*, 37 F.3d 1422, 1427-1432 (10th Cir. 1994), petitions for cert. pending, Nos. 94-1029 & 94-1030 (filed Dec. 9, 1994). Review is warranted to resolve that circuit conflict regarding the constitutionality of Section 2710(d)(7)(A)(i).

b. The constitutionality of 25 U.S.C. 2710(d)(7)(A)(i) follows from this Court's decision in *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989), which sustained the power of Congress under the Interstate Commerce Clause to provide for suits against States. In light of Congress's special powers and responsibilities with respect to Indians, "Congressional power pursuant to the Indian Commerce Clause * * * cannot be less than its authority under the Interstate Commerce Clause." *Spokane Tribe*, 28 F.3d at 997.

In *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), this Court held that Congress has power under Section 5 of the Fourteenth Amendment to abrogate a State's immunity from suit. The Court explained that "[w]hen Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of

the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority." 427 U.S. at 456. In *Union Gas*, the Court held that Congress also has authority under the Interstate Commerce Clause to abrogate a State's immunity from an action for money damages. A plurality of the Court reasoned that, "[l]ike the Fourteenth Amendment, the Commerce Clause with one hand gives power to Congress while, with the other, it takes power away from the States." 491 U.S. at 16. "It cannot be relevant," the plurality continued, "that the Fourteenth Amendment accomplishes this exchange in two steps (§§ 1-4, plus § 5), while the Commerce Clause does it in one." *Id.* at 16-17. According to the plurality, "[t]he important point, rather, is that the provision both expands federal power and contracts state power; that is the meaning, in fact, of a 'plenary' grant of authority." *Id.* at 17.[3]

It follows a *fortiori* from *Union Gas* that Congress may provide for a suit by an Indian Tribe against a State. The United States' power over Indian affairs derives from the Commerce Clause of the Constitution (Art. I, § 8, Cl. 3), the Clauses reserving the Treaty powers to the President and the Senate (Art. II, § 2, Cl. 2); and "from the necessity of giving uniform protection to a dependent people." *Williams* v. *Lee*, 358 U.S. 217, 219 n.4 (1959), citing *United States* v. *Kagama*, 118 U.S. 375 (1886). Congress's power to regulate Indian commerce is rooted

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[3] Justice White expressed his agreement with the conclusion reached by the plurality "that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States," but stated that he "d[id] not agree with much of [the plurality's] reasoning." 491 U.S. at 57 (White, J., concurring in the judgment in part and dissenting in part). Justice White did not offer any additional reasoning.

in the same Clause as its power to regulate interstate commerce, and there is no reason for concluding that its power to provide for suits against States is any less under the Indian component of that Clause than it is under the interstate component. As this Court stated in *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 192 (1989), the Indian Commerce Clause confers on Congress the "plenary power to legislate in the field of Indian affairs."

Indeed, one of the key deficiencies of the Articles of Confederation was that they divided authority over Indian affairs between the States and the central government. Article IX of the Articles of Confederation provided that "[t]he United States in Congress assembled" shall have the "sole and exclusive right" of "regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated." James Madison viewed that attempted division of sovereign authority as an "endeavor to accomplish impossibilities," because it sought "to reconcile a partial sovereignty in the Union, with complete sovereignty in the States." The Federalist No. 42, at 268-269 (C. Rossiter ed. 1961). The division of authority also proved unsatisfactory in practice, because the proviso was relied upon by Georgia and North Carolina to treat with the Indians regarding their land and other objects and thereby "to annul the power itself." *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832). In response to those difficulties—and to the resulting potential for individual States to undermine the security of the United States and the States' collective commitment to the Indians—a committee of the Continental Congress submitted a report in August 1787, while the Constitutional Convention was sitting.

The committee recommended that if the States did not cede the Indian territory within their borders to the United States, they should "accede to Congress's managing, exclusively, all affairs with the Cherokees, Creeks, and other independent tribes within the limits of the said states, so that Congress, in either case, may have the acknowledged power of regulating trade, and making treaties with those tribes, and of preventing on their lands, the intrusions of the white people." 4 J. Amer. Cong. 767 (Way & Gideon ed. 1823); see *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) at 559. The Framers embraced the latter solution, and, "[w]ith the adoption of the Constitution, Indian relations became the exclusive province of federal law." *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 234 (1985) (*Oneida II*); see also *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) at 561 ("[t]he whole intercourse between the United States and this [Indian] nation, is, by our constitution and laws, vested in the government of the United States").

c. The court of appeals acknowledged that *Union Gas* is the closest precedent, but then sought to distinguish it on two grounds. 94-12 Pet. App. 18a-22a. Neither is persuasive.

First, the court observed that the Interstate Commerce Clause and the Indian Commerce Clause have different purposes: Whereas the Interstate Commerce Clause allows Congress to place limits on the States to "maintain[] free trade among the States * * *, the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." 94-12 Pet. App. 21a (quoting *Cotton Petroleum*, 490 U.S. at 192). Those different purposes, however, have no bearing on the issue in this case. In particular, they do not suggest that Congress lacks the power under the latter Clause that *Union Gas*

sustained under the former. To the contrary, Congress's unique power with respect to Indians, its authority and practice of protecting Tribes against state encroachments, and the historical and textual parallels between relations with Indian Tribes and relations with foreign nations, suggest that Congress has the same or greater power to abrogate state immunity from suit under the Indian Commerce Clause.

The court of appeals also sought to distinguish this Court's precedents on the ground that they involved situations in which Congress authorized suits against a State when a State was engaged in an activity "typical of private individuals" and "outside the typical realm of state authority." 94-12 Pet. App. 21a-22a. This Court's precedents do not support such a restricted view of Congress's power under the Clauses of the Constitution that permit it to authorize suits against States. In *Fitzpatrick*, the activity engaged in by the State—employing workers to carry out governmental functions—was within the traditional sphere of state authority. In rejecting the State's claim of immunity from suit in that case, the Court made clear that the nature of the State's activity was irrelevant to the constitutional inquiry. 427 U.S. at 452. And in *Union Gas*, the nature of the State's activity—owning a hazardous waste site—was not mentioned as a factor in the decision. The important factor in *Fitzpatrick* and *Union Gas* was that the States had ceded a portion of their traditional authority when they gave Congress the power to enforce the Fourteenth Amendment and to regulate interstate commerce. As we have explained above, the States, in adopting the Constitution, also unequivocally ceded whatever authority they previously had to regulate Indian affairs.

In any event, the court of appeals erred in characterizing state negotiations with Indian Tribes as within the traditional sphere of state authority. 94-12 Pet. App. 22a. The Constitution assigns the power to make Treaties (including those with Indian Tribes) to the national Government (Art. II, § 2, Cl. 2), and agreements by States with Tribes historically were accomplished under federal auspices. See, *e.g.*, *Oneida II*, *supra*. IGRA is consistent with that constitutional arrangement.

2. The tribal petitioners also challenge the court of appeals' holding that a suit cannot be brought under the doctrine of *Ex parte Young* against the governor of a State arising from the failure by the State to engage in good faith negotiations under IGRA. Under the doctrine of *Ex parte Young*, sovereign immunity does not preclude a suit against a state official for prospective relief designed to vindicate federal law. See *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 104-106 (1984). The tribal petitioners have sought such relief here: They have each sought prospective relief to require the governor to carry out the State's obligation under federal law to negotiate a compact in good faith.

The court of appeals concluded that *Ex parte Young* was inapplicable because negotiating a compact is discretionary. 94-12 Pet. App. 23a-24a. Under IGRA, however, once a Tribe requests the State to negotiate, "the State *shall* negotiate with the Indian tribe in good faith." 25 U.S.C. 2710(d)(3)(A) (emphasis added). If the State does not do so, it can lose the opportunity to shape the scope of gaming activity that will ultimately be permitted under federal law. See 25 U.S.C. 2710(d)(7)(B)(iv) (authorizing court-appointed mediator to choose between proposals submitted by the Tribe and the State); 25 U.S.C. 2710(d)(7)(B)(vii) (authorizing the Secretary of

the Interior to prescribe gaming consistent with the compact selected by the mediator).

The court of appeals also regarded *Ex parte Young* as inapplicable because the tribal suits are, in its view, in reality against the State. 94-12 Pet. App. 24a. But the State is the real party in interest in all official capacity suits. *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989); *Pennhurst*, 465 U.S. at 107-109 & n.17. Under *Ex parte Young*, the state officer's failure to abide by federal law strips the officer of whatever protection from suit the State might have. *Pennhurst*, 465 U.S. at 104. Accordingly, if a suit seeks prospective relief against a state official to vindicate federal law, it is permitted under *Ex parte Young* "notwithstanding the obvious impact on the State itself." *Pennhurst*, 465 U.S. at 104.

As the court of appeals noted, IGRA, by its terms, imposes substantive and remedial obligations on the State, and not on any particular state official. 94-12 Pet. App. 24a. A State, however, can negotiate only through its officials. The obligations that IGRA places on a State can therefore readily be understood to fall on those officials who have authority under state law to negotiate on behalf of the State. Cf. *Home Tel. & Tel. Co.* v. *City of Los Angeles*, 227 U.S. 278, 286 (1913) ("The provisions of the [Fourteenth] Amendment * * * are addressed, of course, to the States, but also to every person whether natural or juridical who is the repository of state power."). There is no apparent dispute in these cases that the governor is the official who has authority in both Florida and Alabama to negotiate on behalf of the State.

If the Court grants review on the question of Congress's power to abrogate the States' sovereign immunity in this setting, it should also grant review of

the question whether a suit may be brought against a governor under the doctrine of *Ex parte Young* to effectuate the compact-negotiation provisions of IGRA. The two questions involve the same statutory section, and a decision on the latter might render it unnecessary to consider the broader constitutional issues raised by the former.

3. Finally, the state petitioners present questions related to a statement in the court of appeals' opinion that if a State asserts its immunity from suit by a Tribe, the Secretary of the Interior would have authority to prescribe regulations for Indian gaming on the Indian lands of that Tribe. 94-12 Pet. App. 25a. The court's discussion of that issue, however, is dictum. Although the state petitioners assert that the court of appeals has created a remedy in favor of the Tribes (94-35 Pet. 10; 94-219 Cross-Pet. 9), the only relief ordered by the court of appeals was dismissal of the suits filed by the Tribes. 94-12 Pet. App. 25a. The court has not required the Secretary to prescribe regulations; it has not precluded the States from arguing to the Secretary that he has no authority to do so; and it has not precluded the States from later bringing a judicial challenge to any assertion of such authority by the Secretary. As Florida acknowledges (94-219 Cross-Pet. 11), what the state petitioners object to is nothing more than a "discussion" of an issue. Plenary review of that issue at this time is therefore unwarranted, even if the Court were to affirm the court of appeals' judgment dismissing these suits. Moreover, no court of appeals has expressed a contrary view on that issue—or even had occasion to do so—since the three other courts of appeals that have considered suits against States under IGRA have upheld Congress's power to authorize such suits.

We do not, however, urge the Court to deny the States' petitions outright at this stage. Plenary consideration of the sovereign immunity and *Ex parte Young* issues raised by the Tribes could conceivably lead the Court to take a different view of the proper disposition of the States' petitions when the Court renders its decision on the merits, and there is no reason for the Court to foreclose its ability to do so.

CONCLUSION

The petitions for a writ of certiorari in Nos. 94-12 and 94-189 should be granted. The petitions for a writ of certiorari in Nos. 94-35 and 94-219 should be held and disposed of as appropriate in light of the Court's decision in Nos. 94-12 and 94-189.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

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v.

STATE OF FLORIDA, ET AL.

STATE OF ALABAMA, ET AL., PETITIONERS

v.

POARCH CREEK INDIANS

POARCH BAND OF CREEK INDIANS, CROSS-PETITIONER

v.

STATE OF ALABAMA, ET AL.

STATE OF FLORIDA, ET AL., CROSS-PETITIONERS

v.

SEMINOLE TRIBE OF FLORIDA

ON PETITIONS AND CROSS-PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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The Solicitor General, on behalf of the United States as amicus curiae, respectfully files this supplemental brief to address a threshold procedural issue that was not taken into account in our initial submission and that now leads us to suggest a different disposition of the cross-petition for a writ of certiorari filed by the Poarch Band of Creek Indians in No. 94-189.

1. These cases arise under the provision of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.*, that provides for a suit to be brought in federal district court arising from a State's failure to negotiate in good faith with an Indian Tribe concerning a compact to govern Class III gaming activities on the Indian country of that Tribe. See 25 U.S.C. 2710(d)(7). The Eleventh Circuit held that Congress does not have authority under the Indian Commerce Clause of the Constitution to authorize a suit by an Indian Tribe against a State, and that a Tribe cannot bring an action under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), against the Governor of the State arising from the State's failure to negotiate concerning a compact. 94-12 Pet. App. 12a-24a. The Eleventh Circuit therefore ordered dismissal of the suits brought by the Seminole Tribe of Florida and the Poarch Band of Creek Indians against the State and Governor of Florida and the State and Governor of Alabama, respectively. 94-12 Pet. App. 25a. The Seminole Tribe (in its petition in No. 94-12) and the Poarch Band (in its cross-petition in No. 94-189) seek review of those holdings.

The court of appeals also expressed the view that, in the event a State raises an Eleventh Amendment defense to such a suit, the Tribe may notify the Secretary of the Interior of the State's failure to negotiate a compact, and at that point the Secretary of the Interior would have authority to promulgate regulations governing Class III

gaming on the Tribe's land. 94-12 Pet. App. 25a. The State of Florida (in its cross-petition in No. 94-219) and the State of Alabama (in its petition in No. 94-35) seek review of that portion of the court of appeals' opinion.

2. In the brief filed on December 28, 1994, we suggested that the Court grant the Tribes' petitions because the Eleventh Circuit has essentially held an Act of Congress unconstitutional, because there is a circuit conflict on the constitutional question, and because the *Ex parte Young* issue that is also raised by the Tribes is related to the issue of whether the Tribes can sue the States themselves. U.S. Br. 9-17. We further suggested, however, that the Court not grant (but instead hold) the States' petitions, because the court of appeals' discussion concerning the authority of the Secretary of the Interior if a State raises an Eleventh Amendment defense is dictum, because there is no circuit conflict on that issue, and because review would be premature in the absence of any action by the Secretary to issue such regulations. U.S. Br. 17-18.

3. In suggesting that the Court hold Alabama's petition for a writ of certiorari but grant the Poarch Band's cross-petition, we did not take into account the fact that although Alabama's petition was filed within 90 days of April 6, 1994, the date on which the court of appeals denied rehearing (see 94-12 Pet. App. 86a), the Poarch Band's cross-petition was not filed until July 29, 1994, and therefore was not timely in its own right under 28 U.S.C. 2101(c) and Rules 13.1 and 13.4 of the Rules of this Court. The Poarch Band's cross-petition was filed less than 30 days after receipt of Alabama's petition, and it therefore is timely under Rule 12.3 of the Rules of this Court. However, Rule 13.5 provides that "a cross-petition which, except for Rule 12.3, would be untimely, will not be granted unless a timely petition for a writ of

certiorari of another party to the case is granted." Accordingly, under this Court's Rules, the Poarch Band's cross-petition cannot be granted unless the Court grants Alabama's petition.

For the reasons stated above and in our initial brief (at 16-17), we continue to believe that the issue raised in Alabama's petition does not warrant plenary review by this Court, and that Alabama's petition (along with Florida's cross-petition in No. 94-219 raising the same issue) should be held and disposed of as appropriate in light of the Court's disposition of the Eleventh Amendment and *Ex parte Young* issues. If the Court chooses to hold Alabama's petition, however, the Poarch Band's cross-petition cannot, under Rule 13.5, be granted. We therefore suggest that the Court hold the Poarch Band's cross-petition in No. 94-189 as well.

The Eleventh Amendment and *Ex parte Young* issues are presented in the Seminole Tribe's certiorari petition in No. 94-12, and the Court can reach and decide those issues in that case. There accordingly is no need to grant review in the *Poarch Band* case in order to resolve those issues. If the Court should later reverse the judgment of the court of appeals in *Seminole Tribe*, it might then choose to grant the pending petition filed by Alabama and cross-petition filed by the Poarch Band, vacate the judgment of the court of appeals in the *Poarch Band* case, and remand that case to the court of appeals for further consideration in light of this Court's ruling in the *Seminole Tribe* case. If, on the other hand, the Court should later sustain the Eleventh Amendment and *Ex parte Young* rulings of the court of appeals in the *Seminole Tribe* case, the Court could then either deny the petition in No. 94-35 and the cross-petitions in Nos. 94-189 and 94-219, or otherwise dispose of the petition and

cross-petitions as appropriate in light of its decision in *Seminole Tribe*.

CONCLUSION

The petition for a writ of certiorari in No. 94-12 should be granted. The petition for a writ of certiorari in No. 94-35 and the cross-petitions for writs of certiorari in Nos. 94-189 and 94-219 should be held and disposed of as appropriate in light of the Court's decision in No. 94-12.

Respectfully submitted.

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JANUARY 1995